



[7590-01-P]

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 2, 30, 40, 50, 52, 60, 61, 63, 70, 71, 72, 76, 110, and 150

[NRC-2013-0132]

RIN 3150-AJ27

Deliberate Misconduct Rule and Hearings on Challenges to the Immediate Effectiveness of Orders

AGENCY: Nuclear Regulatory Commission.

ACTION: Proposed rule.

SUMMARY: The U.S. Nuclear Regulatory Commission (NRC) is proposing to amend its regulations concerning deliberate misconduct by licensees and other persons otherwise subject to the NRC's jurisdiction (known as the "Deliberate Misconduct Rule") and its regulations concerning challenges to immediately effective orders issued by the NRC. This proposed rule would incorporate the concept of "deliberate ignorance" as an additional basis on which to take enforcement action against persons who violate any of the NRC's Deliberate Misconduct Rule provisions. The NRC is also proposing to amend its regulations regarding challenges to the immediate effectiveness of NRC enforcement orders to clarify that the NRC staff has the burden of persuasion in showing that adequate evidence supports the grounds for the order and that immediate effectiveness is warranted and to clarify the authority of the NRC's presiding officer to order live testimony in resolving these challenges.

DATES: Submit comments by **[INSERT DATE 90 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Comments received after this date will be considered if it is practical to do so. However, the NRC is able to ensure consideration only of comments received on or before this date.

ADDRESSES: You may submit comments by any of the following methods (unless this document describes a different method for submitting comments on a specific subject):

- **Federal rulemaking Web site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2013-0132. Address questions about NRC dockets to Carol Gallagher; telephone: 301-287-3422; e-mail: Carol.Gallagher@nrc.gov. For technical questions contact the individual listed in the FOR FURTHER INFORMATION CONTACT section of this proposed rule.

- **E-mail comments to:** Rulemaking.Comments@nrc.gov. If you do not receive an automatic e-mail reply confirming receipt, then contact us at 301-415-1677.

- **Fax comments to:** Secretary, U.S. Nuclear Regulatory Commission at 301-415-1101.

- **Mail comments to:** Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, ATTN: Rulemakings and Adjudications Staff.

- **Hand deliver comments to:** 11555 Rockville Pike, Rockville, Maryland 20852, between 7:30 a.m. and 4:15 p.m. (Eastern Time) Federal workdays; telephone: 301-415-1677.

For additional direction on accessing information and submitting comments, see “Accessing Information and Submitting Comments” in the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Andrew Pessin, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555-0001, telephone: 301-415-1062, e-mail: Andrew.Pessin@nrc.gov.

SUPPLEMENTARY INFORMATION:

I. Accessing Information and Submitting Comments.

A. Accessing Information

Please refer to Docket ID NRC-2013-0132 when contacting the NRC about the availability of information for this proposed rule. You may access publicly-available information related to this proposed rule by any of the following methods:

- **Federal Rulemaking Web Site:** Go to <http://www.regulations.gov> and search for Docket ID NRC-2013-0132.

- **NRC's Agencywide Documents Access and Management System (ADAMS):**

You may access publicly available documents online in the NRC Library at <http://www.nrc.gov/reading-rm/adams.html>. To begin the search, select "[ADAMS Public Documents](#)" and then select "[Begin Web-based ADAMS Search](#)." For problems with ADAMS, please contact the NRC's Public Document Room (PDR) reference staff at 1-800-397-4209, 301-415-4737, or by e-mail to pdr.resource@nrc.gov. The ADAMS accession number for each document referenced in this document (if that document is available in ADAMS) is provided the first time that a document is referenced.

- **NRC's Public Document Room:** You may examine and purchase copies of public documents at the NRC's PDR, Room O1-F21, One White Flint North, 11555 Rockville Pike, Rockville, Maryland 20852.

B. Submitting Comments

Please include Docket ID NRC-2013-0132 in the subject line of your comment submission, in order to ensure that the NRC is able to make your comment submission available to the public in this docket.

The NRC cautions you not to include identifying or contact information in comment submissions that you do not want to be publicly disclosed in your comment submission. The NRC will post all comment submissions at <http://www.regulations.gov> as well as enter the comment submissions into ADAMS, and the NRC does not routinely edit comment submissions to remove identifying or contact information.

If you are requesting or aggregating comments from other persons for submission to the NRC, then you should inform those persons not to include identifying or contact information that they do not want to be publicly disclosed in their comment submission. Your request should state that the NRC does not routinely edit comment submissions to remove such information before making the comment submissions available to the public or entering the comment into ADAMS.

II. Background.

The NRC promulgated the Deliberate Misconduct Rule on August 15, 1991.¹ The Deliberate Misconduct Rule appears in several sections of Title 10 of the *Code of Federal Regulations* (10 CFR).² As explained in the statement of considerations³ for the 1991

¹ 56 FR 40664.

² The Deliberate Misconduct Rule appears in 10 CFR 30.10, 40.10, 50.5, 52.4, 60.11, 61.9b, 63.11, 70.10, 71.8, 72.12, 76.10, and 110.7b.

³ The term "statement of considerations" refers to the section of the *Federal Register* notice of a proposed rule or final rule that sets forth the NRC's rationale and justification for the rule.

rulemaking, the purpose of the Deliberate Misconduct Rule was to put both licensed and unlicensed persons on notice that they may be subject to enforcement action for deliberate misconduct that “causes or, but for detection, would have caused, a [NRC] licensee to be in violation of any rule, regulation, or order, or any term, condition, or limitation of any license, issued by the Commission.”⁴ In this regard, the Deliberate Misconduct Rule also included “individual liability for deliberate submission of incomplete or inaccurate information to the NRC, a licensee, contractor, or subcontractor.”⁵ Therefore, the Deliberate Misconduct Rule expressly extended the NRC’s civil penalty enforcement authority (10 CFR Part 2, Subpart B) to those individuals who, although unlicensed by the NRC, are employed by an NRC licensee, or are employed by a contractor or subcontractor of an NRC licensee or who otherwise “knowingly provide goods or services that relate to a licensee’s activities subject to NRC regulation.”⁶

This proposed rule would amend the Deliberate Misconduct Rule to address an issue that arose during parallel NRC civil and U.S. Department of Justice (DOJ) criminal proceedings involving the same individual and the same set of facts. Specifically, the proposed rule would amend the Deliberate Misconduct Rule to incorporate the concept of “deliberate ignorance” as an additional basis on which to take enforcement action against persons who violate the Deliberate Misconduct Rule. Under federal criminal law, an individual acts with “deliberate ignorance” when that individual attempts to avoid criminal prosecution and conviction by deliberately remaining ignorant of critical facts, which if clearly known by that individual, would provide a basis to criminally prosecute that individual or otherwise subject the individual to an agency civil penalty enforcement proceeding.⁷

⁴ 56 FR at 40665 (alteration added).

⁵ *Id.*

⁶ 56 FR at 40679.

⁷ *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2068-69 (2011) (stating that defendants cannot avoid criminal liability by “deliberately shielding themselves from clear evidence of critical facts

In addition, this proposed rule would amend 10 CFR 2.202, the NRC's regulation governing issuance of orders, including those orders made immediately effective. Presently, the Commission may make orders immediately effective under 10 CFR 2.202(a)(5) if it finds that the public health, safety, or interest so requires or if willful conduct caused a violation of the Atomic Energy Act of 1954, as amended (AEA), an NRC regulation, license condition, or previously issued Commission order. This proposed rule would amend the regulations governing challenges to the immediate effectiveness of an order by clarifying: 1) which party bears the burden of proof required in a hearing on a challenge to the immediate effectiveness of an order and 2) the authority of the presiding officer to call for live testimony in a hearing on a challenge to the immediate effectiveness of an order.

Geisen Proceeding

The deficiencies in the Deliberate Misconduct Rule became apparent with the parallel NRC enforcement proceeding and the DOJ criminal prosecution of David Geisen. On January 4, 2006, the NRC issued an immediately effective order to Mr. Geisen, a former employee at the Davis-Besse Nuclear Power Station, barring him from employment in the nuclear industry for 5 years.⁸ The order charged Mr. Geisen with deliberate misconduct in contributing to the submission of information to the NRC that he knew was not complete or accurate in material respects. The DOJ later obtained a grand jury indictment against Mr. Geisen on charges under 10 U.S.C. 1001 of submitting false statements to the NRC.⁹ In the

that are strongly suggested by the circumstances"); *Id.* at 2069 *citing United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc) ("[i]t is also said that persons who know enough to blind themselves to direct proof of critical facts in effect have actual knowledge of those facts"); *United States v. Gullet*, 713 F.2d 1203, 1212 (6th Cir. 1983) (stating that deliberate ignorance applies when a criminal defendant "deliberately clos[es] his eyes to the obvious risk that he is engaging in unlawful conduct") (alteration added).

⁸ *David Geisen*, LBP-09-24, 70 NRC 676 (2009), *aff'd*, CLI-10-23, 72 NRC 210 (2010).

⁹ *United States v. Geisen*, 2008 WL 6124567 (N.D. Ohio May 2, 2008).

criminal case, the judge gave the jury instructions under the prosecution's two alternative theories: the jury could find Mr. Geisen guilty if he either knew that he was submitting false statements or if he acted with deliberate ignorance of their falsity. Mr. Geisen was convicted on a general verdict; that is, the jury found Mr. Geisen guilty without making findings in regard to either of the prosecution's theories (i.e., whether Mr. Geisen knew that the statements were false or whether he acted with deliberate ignorance). The United States Court of Appeals for the Sixth Circuit upheld Mr. Geisen's conviction on appeal.¹⁰ Because the *Geisen* jury issued a general verdict, it is unknown under which of the alternative theories the jury convicted him.

In the parallel NRC enforcement proceeding, Mr. Geisen's criminal conviction prompted the NRC's Atomic Safety and Licensing Board (the ASLB or the Board) to consider whether Mr. Geisen was collaterally estopped¹¹ from denying the same wrongdoing in the NRC proceeding.¹² A Board majority declined to apply collateral estoppel in the NRC proceeding due to uncertainty over whether the general jury verdict in the criminal proceeding was based on "actual knowledge" or "deliberate ignorance."¹³ In this regard, both the Board and the Commission, on appeal, found that the NRC's Deliberate Misconduct Rule did not include deliberate ignorance.¹⁴

The lack of certainty as to the specific basis of the jury's verdict was significant, because

¹⁰ *United States v. Geisen*, 612 F.3d 471, 485–86 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 1813 (2011).

¹¹ Collateral estoppel precludes a defendant convicted in a criminal proceeding from challenging in a subsequent civil proceeding any facts that were necessary for the criminal conviction. Collateral estoppel applies to quasi-judicial proceedings such as enforcement hearings before the NRC. See, e.g., *SEC v. Freeman*, 290 F.Supp.2d 401, 405 (S.D.N.Y. 2003) ("It is settled that a party in a civil case may be precluded from relitigating issues adjudicated in a prior criminal proceeding and that the Government may rely on the collateral estoppel effect of the conviction in support of establishing the defendant's liability in the subsequent civil action.") (citations omitted).

¹² *Geisen*, LBP-09-24, 70 NRC at 709–26.

¹³ *Id.* at 715–26.

¹⁴ The Board stated that "the [NRC] Staff flatly and unmistakably conceded that the 'deliberate ignorance' theory is not embraced within the 'deliberate misconduct' standard that governs our proceedings." *Id.* at 715 (alteration added). In its decision, the Commission stated "[t]he distinction between the court's 'deliberate ignorance' standard and the [NRC's] 'deliberate misconduct' standard applied in this case is highly significant, indeed, decisive. The Staff, when moving for collateral estoppel, itself *conceded* that 'the 6th Circuit's deliberate ignorance instruction does not meet the NRC's deliberate misconduct standard.'" *Geisen*, CLI-10-23, 72 NRC at 251 (emphasis in the original) (alteration added).

if the verdict was based on actual knowledge, the NRC could apply its identical actual knowledge standard based on the same facts in the criminal case.¹⁵ Conversely, if the verdict was based on deliberate ignorance, the NRC could not apply a deliberate ignorance standard because the NRC did not have such a standard to apply. Therefore, the Commission determined that the potential that the jury convicted on a deliberate ignorance standard for which the NRC had no corresponding standard to apply prohibited the NRC from applying collateral estoppel in its enforcement proceeding against Mr. Geisen.

The NRC enforcement proceeding ended in Mr. Geisen's favor, creating an anomaly: Mr. Geisen was convicted in federal court under a "beyond a reasonable doubt" criminal standard but exonerated before the NRC on a less demanding "preponderance of the evidence" standard. The Commission's *Geisen* decision made clear that the Deliberate Misconduct Rule, as presently written, does not provide for an enforcement action on the basis of deliberate ignorance.

Post-Geisen Proceeding Developments

In Staff Requirements Memoranda-SECY-10-0074, "David Geisen, NRC Staff Petition for Review of LBP-09-24 (Aug. 28, 2009)," dated September 3, 2010 (ADAMS Accession No. ML102460411), the Commission directed the NRC's Office of the General Counsel (OGC) to conduct a review of three issues: 1) how parallel NRC enforcement actions and DOJ criminal prosecutions affect each other, 2) issuance of immediately effective enforcement orders in matters that DOJ is also pursuing, and 3) the degree of knowledge required for pursuing violations against individuals for deliberate misconduct. In 2011, OGC conducted the previously described review. In response, in 2012, the Commission directed OGC to develop a proposed rule that would incorporate the federal standard of "deliberate ignorance" into the Deliberate Misconduct Rule. As part of this effort, the Commission directed OGC to examine the

¹⁵ *Geisen*, CLI-10-23, 72 NRC at 249.

definitions of “deliberate ignorance” from all federal circuit courts to aid in developing the most appropriate definition of this term for the NRC.

The NRC is proposing this rule so that NRC enforcement proceedings and DOJ criminal prosecutions that involve similar violations are carried out in a consistent manner. The proposed rule would incorporate the concept of “deliberate ignorance” into the Deliberate Misconduct Rule. The NRC is also proposing this rule to clarify two aspects of the NRC’s regulations regarding challenges to the immediate effectiveness of orders: 1) the burden of proof and 2) the authority of the presiding officer to order live testimony in resolving such a challenge. The burden of proof has been defined as meaning the burden of persuasion, which is the need to establish the validity of a claim or overcome opposing evidence.¹⁶ A related concept, sometimes included within the burden of proof, is the burden of going forward with evidence, which is the need to produce enough evidence to make a case.¹⁷

The NRC has researched the definition of deliberate ignorance used by the Supreme Court and federal circuit courts to inform the NRC’s definition of this term. In drafting the proposed amendments to 10 CFR 2.202, the NRC reviewed the way in which the ASLB has interpreted the burden of proof in hearings on challenges to the immediate effectiveness of an order. The NRC also reviewed the NRC’s current regulations and practices regarding the authority of the presiding officer to call for live testimony in hearings on challenges to the immediate effectiveness of an order.

Deliberate Misconduct Rule

The NRC’s predecessor agency, the Atomic Energy Commission, established the criteria used to conduct enforcement activities in 1972.¹⁸ Early guidance did not discuss “willfulness”

¹⁶ *Director, OWCP Department of Labor v. Greenwich Collieries*, 512 U.S. 267, 272-81, 114 S. Ct. 2251, 2255-59 (1994).

¹⁷ *Id.*

¹⁸ 37 FR 21962; October 17, 1972.

and instead advised licensees that a broad range of enforcement actions could be applied to a range of violations. In 1979, the Commission directed the NRC staff to prepare a comprehensive Enforcement Policy that applied to applicants and licensees but not to employees of applicants and licensees. The first version of the NRC Enforcement Policy, adopted in 1982, stated that the Severity Level or significance of a violation may be increased upon a finding of willfulness.¹⁹ The NRC Enforcement Policy defined “willfulness” as including “a spectrum of violations ranging from deliberate intent to violate or falsify to and including careless disregard for requirements.”²⁰ Therefore, under the original Enforcement Policy, the NRC could have found that an applicant or licensee violated a rule, order, or license condition without regard to whether the applicant or licensee intended to commit, or knew that it was committing, a violation, but the Severity Level or significance depended, in part, on whether the violation was willful. Under the current NRC Enforcement Policy, willfulness remains a factor in assessing the Severity Level or significance of a violation (NRC Enforcement Policy, dated January 28, 2013, ADAMS Accession No. ML12340A295).

In 1990, the Commission published the proposed Deliberate Misconduct Rule to address willful misconduct by persons not licensed by the NRC.²¹ Until that time, a licensee was able to dismiss an employee for willful misconduct “either by its own decision or because the NRC formally order[ed] removal of the employee from licensed activity.”²² In the 1990 proposed Deliberate Misconduct Rule’s statement of considerations, the Commission stated its concern that such an employee, following dismissal, could seek other nuclear-related employment without the NRC’s knowledge of this employment or the new employer’s knowledge of the employee’s past willful misconduct.²³ The Commission also noted that “willful acts of licensees’ contractors, vendors, or their employees have caused licensees to be in violation of

¹⁹ 47 FR 9987; March 9, 1982.

²⁰ *Id.* at 9990.

²¹ 55 FR 12374; April 3, 1990.

²² *Id.* at 12374 (alteration added).

²³ *Id.*

Commission requirements.”²⁴ The purpose of the 1990 proposed Deliberate Misconduct Rule was to address unlicensed persons who are engaged in licensed activities and whose willful misconduct “causes a licensee to be in violation of a Commission requirement or places in question the NRC’s reasonable assurance of adequate protection of the public health and safety.”²⁵

Under the 1990 proposed Deliberate Misconduct Rule, an act was deemed willful if a person knew that the conduct was prohibited or exhibited a careless disregard for whether the conduct was prohibited. The 1990 proposed Deliberate Misconduct Rule described the term “careless disregard” as behavior that “connotes a reckless disregard or callous...indifference toward one’s responsibilities or the consequences of one’s actions.”²⁶ In the statement of considerations for the 1990 proposed Deliberate Misconduct Rule, the Commission noted that the rule would not be applied against “conscientious people” who simply acted negligently.²⁷

The Commission published the Deliberate Misconduct Rule as a final rule on August 15, 1991 (“1991 final Deliberate Misconduct Rule”).²⁸ The 1991 final Deliberate Misconduct Rule promulgated the following provisions: 10 CFR 30.10, 40.10, 50.5, 60.11, 61.9b, 70.10, 72.12, and 110.7b. These Deliberate Misconduct Rule provisions applied to NRC licensees, any employee of an NRC licensee, and any contractor (including a supplier or consultant), subcontractor, or any employee of a contractor or subcontractor, of any licensee.²⁹ These Deliberate Misconduct Rule provisions placed licensed and unlicensed persons on notice that they may be subject to enforcement action for deliberate misconduct that causes or would have caused, if not detected, a licensee to be in violation of any of the Commission’s requirements, or

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at 12377.

²⁸ 56 FR 40664.

²⁹ In a 1998 rulemaking, the Commission expanded the scope of the Deliberate Misconduct Rule to additional categories of persons, including applicants for NRC licenses (63 FR 1890; January 13, 1998). The 1998 rule also added new Deliberate Misconduct Rule provisions to 10 CFR Parts 52 and 71 (10 CFR 52.9 and 10 CFR 71.11). The 10 CFR Part 52 and the 10 CFR Part 71 Deliberate Misconduct Rule provisions were later redesignated as 10 CFR 52.4 and 10 CFR 71.8, respectively.

for deliberately providing to the NRC, a licensee, or contractor information that is incomplete or inaccurate in some respect material to the NRC.

In addition, the 1991 final Deliberate Misconduct Rule made conforming changes to the corresponding “Scope” provisions (i.e., 10 CFR 30.1, 40.2, 50.1, 60.1, 61.1, 70.2, 72.2, and 110.1) to provide express notice to all applicable persons that they would be subject to the Deliberate Misconduct Rule. Similarly, the 1991 final Deliberate Misconduct Rule amended 10 CFR 150.2, “Scope,” to provide notice to Agreement State licensees conducting activities under reciprocity in areas of NRC jurisdiction that they are subject to the applicable Deliberate Misconduct Rule provisions (10 CFR 30.10, 40.10, or 70.10).

The statement of considerations for the 1991 final Deliberate Misconduct Rule included the NRC’s responses to public comments received on the 1990 proposed Deliberate Misconduct Rule. One group of comments raised the concern that including “careless disregard” as a type of willful misconduct would be a disincentive to nuclear-related employment.³⁰ In response to these comments, the Commission modified the rule to only apply to a person who engages in deliberate misconduct or who deliberately submits incomplete or inaccurate information, narrowing the scope of the Deliberate Misconduct Rule.³¹ The Commission predicted that this narrowed scope of the rule would “not differ significantly from the range of actions that might subject the individual to criminal prosecution.”³² Yet, the *Geisen* enforcement proceeding and parallel criminal prosecution, previously described, indicate that the scope of the current Deliberate Misconduct Rule differs from the range of actions subject to criminal prosecution.

Immediately Effective Orders

³⁰ 56 FR at 40675.

³¹ *Id.*

³² *Id.*

The Commission's procedures to initiate formal enforcement action are found in the regulations set forth in 10 CFR Part 2, Subpart B. These regulations include 10 CFR 2.202, "Orders." An order is a written NRC directive to modify, suspend, or revoke a license; to cease and desist from a given practice or activity; or to take another action as appropriate.³³ The Commission's statutory authority to issue an order is Section 161 of the AEA.³⁴ The NRC may issue orders in lieu of or in addition to civil penalties (Section 2.3.5 of the NRC Enforcement Policy (2013)). When the NRC determines that the conduct that caused a violation was willful or when the Commission determines that the public health, safety, or interest requires immediate action, the Commission may make orders immediately effective, meaning the subject of the order does not have a prior opportunity for a hearing before the order goes into effect.³⁵ Making enforcement orders "immediately effective" has been an integral part of 10 CFR 2.202 since 1962, and Section 9(b) of the Administrative Procedure Act (APA), 5 U.S.C. 558(c), expressly authorizes immediately effective orders.

On the same day that the Commission published the 1990 proposed Deliberate Misconduct Rule, it also published a related proposed rule that would expressly allow the Commission to issue orders to unlicensed persons, "when such persons have demonstrated that future control over their activities subject to the NRC's jurisdiction is deemed to be necessary or desirable to protect public health and safety or to minimize danger to life or property or to protect the common defense and security."³⁶ This proposed rule concerned amendments to 10 CFR 2.202 and other 10 CFR Part 2 provisions.³⁷ At the time of the April 1990 proposed rule, the Commission's regulations only authorized the issuance of an order to a licensee. Therefore, the intent of the 1990 proposed Deliberate Misconduct Rule and its companion April 1990 proposed rule was to establish a mechanism to issue "an order...to an

³³ 10 CFR 2.202(a).

³⁴ 42 U.S.C. 2201.

³⁵ 10 CFR 2.202(b).

³⁶ 55 FR 12370, 12371; April 3, 1990.

³⁷ *Id.* at 12373-74.

unlicensed person who willfully causes a licensee to be in violation of Commission requirements or whose willful misconduct undermines, or calls into question, the adequate protection of the public health and safety in connection with activities regulated by the NRC under the [AEA].”³⁸ These proposed changes were adopted, with some modifications, in the 1991 final Deliberate Misconduct Rule.³⁹ In this regard, the 1991 final Deliberate Misconduct Rule amended 10 CFR 2.202 and other provisions of 10 CFR Part 2 (i.e., 10 CFR 2.1, 2.201, 2.204, 2.700, and Appendix C to 10 CFR Part 2), which authorized the issuance of an order to unlicensed persons otherwise subject to the NRC’s jurisdiction.

On July 5, 1990, the Commission published another proposed rule that would make additional changes to 10 CFR 2.202.⁴⁰ These additional changes pertained to orders that are made immediately effective. Primarily, the July 5, 1990, proposed rule would have required that challenges to immediately effective orders be heard expeditiously. The statement of considerations for the July 5, 1990, proposed rule noted that “the Commission believes that a proper balance between the private and governmental interests involved is achieved by a hearing conducted on an accelerated basis.”⁴¹ The statement of considerations also stated that a “motion to set aside immediate effectiveness must be based on one or both of the following grounds: The willful misconduct charged is unfounded or the public health, safety or interest does not require the order to be made immediately effective.”⁴²

In addition, the July 5, 1990, proposed rule provided the following statement regarding the respective burdens of a party filing a motion to challenge the immediate effectiveness aspect of an immediately effective order and that of the NRC staff:

The burden of going forward on the immediate effectiveness issue is with the party who moves to set aside the immediate effectiveness provision. The burden of persuasion on the

³⁸ *Id.* at 12372.

³⁹ 56 FR 40664; August 15, 1991.

⁴⁰ 55 FR 27645.

⁴¹ *Id.*

⁴² *Id.*

appropriateness of immediate effectiveness is on the NRC staff.⁴³

After receiving public comments on the July 5, 1990, proposed rule, the Commission published a final rule on May 12, 1992.⁴⁴ The Commission acknowledged in the May 12, 1992, final rule that “an immediately effective order may cause a person to suffer loss of employment while the order is being adjudicated” but recognized that the effects of health and safety violations are paramount over an individual’s right of employment.⁴⁵ Accordingly, the final rule amended § 2.202(c) “to allow early challenges to the immediate effectiveness aspect of immediately effective orders.”⁴⁶ The final rule also provided for an expedited hearing on both the merits of the immediately effective order and a challenge to set aside immediate effectiveness. The presiding officer in an immediate effectiveness challenge must dispose of the defendant’s motion to set aside the immediate effectiveness of the order “expeditiously” (10 CFR 2.202(c)(2)(i)), generally within 15 days.⁴⁷ Therefore, the Commission struck a balance between the governmental interests in protecting public health and safety and the individual interests in fairness by requiring that challenges to immediately effective orders be heard expeditiously.

Burden of Going Forward and Burden of Persuasion

In opposing the immediate effectiveness aspect of an order, the party subject to the order, or respondent, must initiate the proceeding by filing affidavits and other evidence, which state that the order and the NRC staff’s determination that it is necessary to make the order immediately effective are “not based on adequate evidence, but on mere suspicion, unfounded allegations, or error.”⁴⁸ The respondent’s obligation to challenge the order is known as the

⁴³ *Id.* at 27646.

⁴⁴ 57 FR 20194.

⁴⁵ *Id.* at 20195.

⁴⁶ *Id.* at 20194.

⁴⁷ *Id.* at 20196.

⁴⁸ 10 CFR 2.202(c)(2)(i).

“burden of going forward.”⁴⁹ Section 2.202, however, has been interpreted to mean that the NRC staff bears the “burden of persuasion” to demonstrate that the order itself and the immediate effectiveness determination are supported by “adequate evidence.”⁵⁰ In a 2005 matter, the Board described what the NRC staff must prove and stated:

The staff must satisfy a two-part test: it must demonstrate that adequate evidence—i.e. reliable, probative and substantial (but not preponderant) evidence—supports a conclusion that (1) the licensee violated a Commission requirement (10 C.F.R. § 2.202(a)(1)), *and* (2) the violation was ‘willful,’ *or* the violation poses a risk to ‘the public health, safety, or interest’ that requires immediate action (*id.* § 2.202(a)(5)).⁵¹

Although Mr. Geisen never challenged the immediate effectiveness aspect of the Commission’s order (which barred him from involvement in all NRC-licensed activities for 5 years), one of the Board’s judges raised the concern that 10 CFR 2.202(c)(2)(i) could be interpreted to place the burden of persuasion on the party subject to the order to show that the order is based on mere suspicion, unfounded allegations, or error.⁵² This proposed rule would clarify that the burden of persuasion is the obligation of the NRC staff, not the party subject to the order.

Authority of the Presiding Officer to Order Live Testimony

The July 5, 1990, proposed rule’s statement of considerations contemplated the possibility of an evidentiary hearing as part of a challenge to immediate effectiveness and stated that:

It is expected that the presiding officer normally will decide the question of immediate effectiveness solely on the basis of the order and other filings on the record. The presiding officer may call for oral argument. However, an evidentiary hearing is to be

⁴⁹ *United Evaluation Services, Inc.*, LBP-02-13, 55 NRC 351, 354 (2002).

⁵⁰ *Id.*

⁵¹ *Safety Light Corp.* (Bloomsburg, Pennsylvania Site), LBP-05-02, 61 NRC 53, 61 (2005) (emphasis in the original).

⁵² *Geisen*, “Additional Views of Judge Farrar,” LBP-09-24, 70 NRC at 801, n.12 (“To succeed under the terms of [10 CFR 2.202(c)(2)(i)], the challenge brought by the Order’s target must show that ‘the order, including the need for immediate effectiveness, is not based on adequate evidence but on *mere suspicion, unfounded allegations, or error.*’ In addition to having the burden on immediate effectiveness, the target is apparently expected to address the merits at that point as well, as is indicated by the next sentence, which requires the challenge to ‘state with particularity the reasons why the order is not based on adequate evidence’ and to ‘be accompanied by affidavits or other evidence relied on.’ 10 C.F.R. § 2.202(c)(2)(i). All in 20 days, unless extended. *id.* § 2.202(a)(2)”) (emphasis in the original).

held only if the presiding officer finds the record is inadequate to reach a proper decision on immediate effectiveness. Such a situation is expected to occur only rarely.⁵³

The May 12, 1992, final rule, however, simply stated that “[t]he presiding officer may call for oral argument but is not required to do so.”⁵⁴ Section 2.319 outlines the presiding officer’s authority to “conduct a fair and impartial hearing according to law, and to take appropriate action to control the prehearing and hearing process, to avoid delay and maintain order,” including the power to examine witnesses, but this power is not specified in 10 CFR 2.202.

III. Discussion of Proposed Changes.

Deliberate Misconduct Rule

The NRC proposes to incorporate the concept of deliberate ignorance into the various Deliberate Misconduct Rule provisions by 1) prohibiting a person from submitting information where the person subjectively believes that there is a high probability that the information is incomplete or inaccurate but takes deliberate actions to remain ignorant of the incompleteness or inaccuracy of that information; and 2) extending the Deliberate Misconduct Rule’s definition of “deliberate misconduct by a person” to include situations where the person subjectively believes that there is a high probability that an act or omission will cause a violation but the person takes deliberate action to avoid confirming or learning whether the act or omission will cause a violation.

In drafting this proposed rule, the NRC reviewed definitions of “deliberate ignorance” from the Supreme Court and all federal circuit courts to help develop the most appropriate definition of the term for the agency. In *Global-Tech Appliances, Inc. v. SEB S.A.*,⁵⁵ the Supreme Court found that it is reasonable to infer knowledge from willful blindness, or deliberate

⁵³ 55 FR 27645–46.

⁵⁴ 57 FR 20196.

⁵⁵ 131 S. Ct. 2060 (2011).

ignorance, as long as deliberate ignorance or willful blindness is properly defined so as not to be conflated with recklessness or negligence. In this case, the Supreme Court recognized that every Court of Appeals, with the exception of the District of Columbia Circuit, has fully embraced the theory that the knowledge requirement of criminal statutes is satisfied by either 1) actual knowledge or 2) constructive knowledge through “deliberate ignorance” or “willful blindness.”⁵⁶ The majority of Courts of Appeals make the equivalency of knowledge and deliberate ignorance or willful blindness explicit in their pattern or model jury instructions.⁵⁷ Other Courts of Appeals have not used pattern or model jury instructions to define deliberate ignorance or willful blindness, but these courts have explained in case law that constructive knowledge may be demonstrated by a showing of deliberate ignorance or willful blindness.⁵⁸ The District of Columbia Circuit is the only federal Court of Appeals that has not embraced the theory of deliberate ignorance or willful blindness. Rather, the District of Columbia Circuit has expressed concern with the trend to equate deliberate ignorance and willful blindness with knowledge, stating that “[i]t makes obvious sense to say that a person cannot act ‘knowingly’ if she does not know what is going on. To add that such a person nevertheless acts ‘knowingly’ if she intentionally does not know what is going on is something else again.”⁵⁹

The Supreme Court recognized the District of Columbia Circuit’s decision not to embrace fully the deliberate ignorance or willful blindness standard in *Global-Tech Appliances*, yet the Supreme Court still found that it is reasonable to infer knowledge from deliberate

⁵⁶ The term “willful blindness” is akin to the term “deliberate ignorance.” In *Global-Tech Appliances*, the Court stated that “a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts.” *Global-Tech Appliances*, 131 S. Ct. at 2070–71.

⁵⁷ The First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals have incorporated willful blindness or deliberate ignorance into their pattern or model jury instructions. Pattern or model jury instructions are plain language formulations of case law that judges may provide to juries as legal explanations. These jury instructions are given legal weight through their use in trials and subsequent approval of that use on appeal.

⁵⁸ The Second Circuit, see, e.g., *United States v. Coplan*, 703 F.3d 46 (2d Cir. 2012), and Fourth Circuit, see, e.g., *United States v. Poole*, 640 F.3d 114 (4th Cir. 2011), have applied deliberate ignorance or willful blindness in case law.

⁵⁹ *United States v. Alston-Graves*, 435 F.3d 331, 337 (D.C. Cir. 2006).

ignorance or willful blindness. The Court stated that “while the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.”⁶⁰ According to the Supreme Court, the standard of deliberate ignorance or willful blindness surpasses the standards of recklessness and negligence such that a willfully blind defendant “can almost be said to have actual knowledge of the critical facts.”⁶¹ Therefore, deliberate ignorance or willful blindness satisfies the knowledge requirement of criminal statutes.

In this proposed rule, the NRC would amend the Deliberate Misconduct Rule to incorporate “deliberate ignorance” as an additional basis on which to take enforcement action against persons who violate the rule. Such an amendment would therefore allow the Commission and the ASLB to apply collateral estoppel, if appropriate, in future NRC enforcement proceedings and would avoid anomalies like the outcome of the *Geisen* case.

Immediately Effective Orders

This proposed rule would amend 10 CFR 2.202(c)(2) to clarify that in any challenge to the immediate effectiveness of an order, the NRC staff bears the burden of persuasion; whereas the party challenging the order bears the burden of going forward.⁶² Specifically, the proposed amendment would state that the NRC staff must show that 1) adequate evidence supports the grounds for the order and 2) immediate effectiveness is warranted.⁶³

This proposed rule would further amend 10 CFR 2.202(c)(2) to confirm the presiding

⁶⁰ *Global-Tech Appliances*, 131 S. Ct. at 2070 (citations omitted).

⁶¹ *Id.* at 2070-71.

⁶² The party challenging the order has the obligation to initiate the proceeding, namely, by filing the appropriate motion under 10 CFR 2.202(c)(2)(i). This motion “must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on.” 10 CFR 2.202(c)(2)(i).

⁶³ The Administrative Procedure Act provides “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. 556(d).

officer's authority to order live testimony, including cross examination of witnesses, in hearings on challenges to the immediate effectiveness of orders, if the presiding officer concludes that taking live testimony would assist in its decision on the motion. Similarly, the proposed rule would allow any party to the proceeding to file a motion requesting the Board to order live testimony. The proposed amendments would allow the NRC staff, in cases where the presiding officer orders live testimony, the option of presenting its response through live testimony rather than a written response made within 5 days of its receipt of the motion. The NRC does not anticipate that permitting the presiding officer to allow live testimony would cause delay, and even if it were to cause delay, public health and safety would not be prejudiced because the immediately effective order would remain in effect throughout the hearing.

The proposed rule would also amend 10 CFR 2.202(c)(2) to clarify that the presiding officer shall conduct any live testimony pursuant to 10 CFR 2.319, except that no subpoenas, discovery, or referred rulings or certified questions to the Commission shall be permitted for this purpose. Finally, the proposed rule would amend 10 CFR 2.202(c)(2) by dividing the paragraph into smaller paragraphs, adding a cross reference to 10 CFR 2.202(a)(5), which is the regulation that authorizes the Commission to make an order immediately effective, and making other minor edits to improve clarity and readability.

Conforming Amendments

The NRC regulation, 10 CFR 150.2, "Scope," provides notice to Agreement State licensees conducting activities under reciprocity in areas of NRC jurisdiction that they are subject to the applicable NRC Deliberate Misconduct Rule provisions. When the NRC first promulgated the Deliberate Misconduct Rule in 1991, it failed to list 10 CFR 61.9b as a cross reference in 10 CFR 150.2 (at the time, 10 CFR 150.2 listed 10 CFR 30.10, 40.10, and 70.10 as the Deliberate Misconduct Rule provisions applicable to Agreement State licensees conducting activities under reciprocity in areas of NRC jurisdiction).

When first promulgated on January 13, 1998, the NRC designated the 10 CFR Part 71 Deliberate Misconduct Rule provision as 10 CFR 71.11;⁶⁴ the NRC made the appropriate conforming amendment to 10 CFR 150.2, by listing 10 CFR 71.11 as a cross reference.⁶⁵ The NRC later redesignated the provision as 10 CFR 71.8,⁶⁶ but did not make a conforming amendment to update the cross-reference in 10 CFR 150.2. The current 10 CFR 150.2 provision still lists the 10 CFR Part 71 Deliberate Misconduct Rule provision as 10 CFR 71.11.

This proposed rule would make the appropriate conforming changes to 10 CFR 150.2 by adding a cross reference to 10 CFR 61.9b and deleting the cross reference to 10 CFR 71.11 and replacing it with 10 CFR 71.8.

IV. Section-by-Section Analysis.

Deliberate Misconduct Rule Changes

This proposed rule would amend the following Deliberate Misconduct Rule regulations: 10 CFR 30.10, 40.10, 50.5, 52.4, 60.11, 61.9b, 63.11, 70.10, 71.8, 72.12, 76.10, and 110.7b. The language of these regulations is similar, and in many instances, identical. The differences in language typically relate to the categories of persons or other entities being regulated by that regulation. Other than 10 CFR 52.4 and 10 CFR 71.8, the format of these regulations is the same.

The proposed rule would revise paragraph (a)(2) of 10 CFR 30.10, 40.10, 50.5, 60.11, 61.9b, 63.11, 70.10, 72.12, 76.10, and 110.7b; paragraph (c)(2) of 10 CFR 52.4; and paragraph (b)(2) of 10 CFR 71.8 to add a clause that expressly prohibits the deliberate submission of information to the NRC or other specified entity or individual when the person submitting the

⁶⁴ 63 FR at 1899.

⁶⁵ 63 FR at 1901.

⁶⁶ In a 2004 rulemaking amending its regulations concerning the packaging and transport of radioactive materials, the NRC renumbered 10 CFR 71.11 to 10 CFR 71.8 (69 FR 3698, 3764, and 3790; January 26, 2004).

information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information. The clause added by the proposed rule would be designated as paragraph (c)(2)(ii) for 10 CFR 52.4, paragraph (b)(2)(ii) of 10 CFR 71.8, and paragraph (a)(2)(ii) for all other Deliberate Misconduct Rule regulations. The proposed rule will designate the existing prohibition, on the deliberate submission of information to the NRC or other specified entity or individual when the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC, as paragraph (c)(2)(i) for 10 CFR 52.4, paragraph (b)(2)(i) of 10 CFR 71.8, and paragraph (a)(2)(i) for all other Deliberate Misconduct Rule regulations.

The proposed rule would revise paragraph (c) of 10 CFR 30.10, 40.10, 50.5, 60.11, 61.9b, 63.11, 70.10, 72.12, 76.10, and 110.7b. Paragraph (c) defines the term “deliberate misconduct.” Specifically, the proposed rule would revise the introductory text of paragraph (c) and the language of paragraphs (c)(1)-(2). These revisions are editorial in nature and support, in terms of readability and clarity, the addition of a new paragraph (c)(3). New paragraph (c)(3) would expand the definition of “deliberate misconduct” to include an intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

Similarly, the proposed rule would revise paragraph (b) of 10 CFR 52.4 and paragraph (d) of 10 CFR 71.8; these paragraphs define the term “deliberate misconduct” for those regulations. The proposed rule would revise the introductory text of paragraph (b) and the language of paragraphs (b)(i)-(ii) for 10 CFR 52.4, and the introductory text of paragraph (d) and the language of paragraphs (d)(1)-(2) for 10 CFR 71.8. These revisions are editorial in nature and support, in terms of readability and clarity, the addition of a new paragraph (b)(iii), for 10 CFR 52.4, and the addition of a new paragraph (d)(3), for 10 CFR 71.8. New paragraphs,

10 CFR 52.4(b)(iii) and 10 CFR 71.8(d)(3), would expand the definition of “deliberate misconduct” to include an intentional act or omission that the person subjectively believes has a high probability of causing a violation, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

Immediate Effectiveness of Orders Rule Changes

Section 2.202

The proposed rule would make several changes to 10 CFR 2.202(c)(2)(i). The proposed rule would revise 10 CFR 2.202(c)(2)(i) by dividing it into several smaller paragraphs. The proposed rule would revise 10 CFR 2.202(c)(2)(i) to include only the first two sentences of the current 10 CFR 2.202(c)(2)(i), which concern the right of the party subject to an immediately effective order to challenge the immediate effectiveness of that order. The proposed rule would further revise the first sentence to add a cross reference to 10 CFR 2.202(a)(5) and make other minor, clarifying editorial changes to that sentence.

The proposed rule would add a new paragraph, 10 CFR 2.202(c)(2)(ii), which would allow any party to file a motion with the presiding officer requesting that the presiding officer order live testimony. The proposed new 10 CFR 2.202(c)(2)(ii) would also authorize the presiding officer, on its own motion, to order live testimony.

The proposed rule would redesignate the third sentence of the current 10 CFR 2.202(c)(2)(i) as a new paragraph, 10 CFR 2.202(c)(2)(iii), which would concern the staff’s response to a motion challenging the immediate effectiveness of an order. The proposed 10 CFR 2.202(c)(2)(iii) would authorize the NRC staff to present its response through live testimony rather than a written response in those cases where the presiding officer orders live testimony.

The proposed rule would add a new paragraph, 10 CFR 2.202(c)(2)(iv), which provides that the presiding officer shall conduct any live testimony pursuant to 10 CFR 2.319.

The proposed rule would make a minor clarifying change to 10 CFR 2.202(c)(2)(ii) and redesignate that paragraph as 10 CFR 2.202(c)(2)(v).

The proposed rule would add a new paragraph, 10 CFR 2.202(c)(2)(vi), which would clarify that the licensee or other person challenging the immediate effectiveness of an order bears the burden of going forward, whereas the NRC staff bears the burden of persuasion that adequate evidence supports the grounds for the immediately effective order and that immediate effectiveness is warranted.

The proposed rule would make minor clarifying changes to the fourth and fifth sentences of 10 CFR 2.202(c)(2)(i), which direct the presiding officer's expeditious disposition of the motion to set aside immediate effectiveness and prohibit the presiding officer from staying the immediate effectiveness of the order, respectively, and redesignate those sentences as a new paragraph, 10 CFR 2.202(c)(2)(vii).

The proposed rule would make minor clarifying changes to the eighth sentence of 10 CFR 2.202(c)(2)(i), and would redesignate the sixth, seventh, and eighth sentences of the 10 CFR 2.202(c)(2)(i) as a new paragraph, 10 CFR 2.202(c)(2)(viii). These sentences concern the direction to the presiding officer to uphold the immediate effectiveness of the order upon finding adequate evidence to support immediate effectiveness, the final agency action status of an order upholding immediate effectiveness, and the prompt referral by the presiding officer of an order setting aside immediate effectiveness to the Commission and that such order will not be effective pending further order of the Commission, respectively.

Conforming Amendments to 10 CFR 150.2

This proposed rule would revise the last sentence of 10 CFR 150.2 by adding a cross reference to 10 CFR 61.9b and deleting the cross reference to 10 CFR 71.11 and replacing it with 10 CFR 71.8.

Administrative Changes to Authority Citations

The authority citations for 10 CFR Parts 2, 30, 60, 61, 63, 71, 72, 76, 110, and 150 would be revised to make editorial changes that are administrative in nature, including inserting missing parentheses and punctuation. The proposed revisions would not change the statutory authority.

V. Plain Writing.

The Plain Writing Act of 2010 (Pub. L. 111-274) requires Federal agencies to write documents in a clear, concise, and well-organized manner. The NRC has written this document to be consistent with the Plain Writing Act as well as the Presidential Memorandum, "Plain Language in Government Writing," published June 10, 1998 (63 FR 31883). In complying with this directive, proposed editorial changes have been made to the various NRC regulations that are the subject of this proposed rule. These editorial changes, if promulgated, will improve the organization and readability of these regulations. These types of changes are not discussed further in this document. The NRC requests comment on the proposed rule with respect to the clarity and effectiveness of the language used.

VI. Voluntary Consensus Standards.

The National Technology Transfer and Advancement Act of 1995, Pub. Law 104-113, requires that Federal agencies use technical standards that are developed by voluntary, private sector, consensus standards bodies unless using such a standard is inconsistent with applicable law or is otherwise impractical. In this rule, the NRC is proposing to amend its Deliberate Misconduct Rule and two aspects of challenges to the immediate effectiveness of NRC enforcement orders: 1) the burden of proof and 2) the authority of the presiding officer to

order live testimony in resolving such a challenge. This action does not constitute the establishment of a government-unique standard as defined in Office of Management and Budget (OMB) Circular A-119 (1998).

VII. Environmental Impact: Categorical Exclusion.

The NRC has determined that the issuance of this proposed rule relates to enforcement matters and, therefore, falls within the scope of 10 CFR 51.10(d). In addition, the NRC has determined that the issuance of this proposed rule is a type of action described in categorical exclusions 10 CFR 51.22(c)(1)-(2). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this rulemaking.

VIII. Paperwork Reduction Act Statement.

This proposed rule does not contain new or amended information collection requirements subject to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). Existing requirements were approved by OMB, approval numbers 3150-0017, -0020, -0011, -0151, -0127, -0135, -0199, -0009, -0008, -0132, and -0036.

Public Protection Notification.

The NRC may not conduct or sponsor, and a person is not required to respond to, a request for information or an information collection requirement unless the requesting document displays a currently valid OMB control number.

IX. Regulatory Analysis.

The proposed rule would amend the NRC's Deliberate Misconduct Rule regulations to incorporate the concept of deliberate ignorance as an additional basis on which to take enforcement action and to make clarifications to the NRC regulations governing hearings on

challenges to the immediate effectiveness of orders. In addition, the proposed rule would make minor, conforming amendments to 10 CFR 150.2. These proposed amendments, if promulgated, do not result in a cost to the NRC and do not result in a cost to licensees or others who would comply with the proposed amendments. These amendments would accrue a benefit by aligning NRC enforcement proceedings with criminal proceedings, making NRC enforcement proceedings more efficient. The amendments to the rule governing hearings on challenges to immediate effectiveness of orders would not change the existing processes but would merely clarify the rule. These amendments would not result in a cost to the NRC or to respondents in hearings on challenges to immediate effectiveness of orders but a benefit would accrue to the extent that potential confusion over the meaning of the NRC's regulations is removed. The NRC believes that the proposed rule would improve the efficiency of NRC enforcement proceedings without imposing costs on either the NRC or on participants in such proceedings.

X. Regulatory Flexibility Act Certification.

In accordance with the Regulatory Flexibility Act, as amended, 5 U.S.C. 605(b), the NRC certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities. This proposed rule would affect small businesses as they are defined in Section 3 of the Small Business Act, 15 U.S.C. 632, and the standards set forth in 13 CFR Part 121, and within the size standards established by the NRC (10 CFR 2.810). However, this proposed rule would not have a significant economic impact on these entities because 1) the amendments to the Deliberate Misconduct Rule do not impose any costs of compliance and 2) the proposed amendments to the rules governing hearings on immediate effectiveness of orders do not impose additional costs and would improve the efficiency of these hearings by clarifying the rules governing these hearings.

XI. Compatibility of Agreement State Regulations.

Under the “Policy Statement on Adequacy and Compatibility of Agreement State Programs” approved by the Commission on June 30, 1997, and published in the *Federal Register* (62 FR 46517; September 3, 1997), this proposed rule will be a matter of compatibility between the NRC and the Agreement States, thereby providing consistency among the Agreement States and the NRC requirements. The NRC staff analyzed the proposed rule in accordance with the procedure established within Part III, “Categorization Process for NRC Program Elements,” of Handbook 5.9 to Management Directive 5.9, “Adequacy and Compatibility of Agreement State Programs” (a copy of which may be viewed at <http://www.nrc.gov/reading-rm/doc-collections/management-directives/>).

The NRC program elements (including regulations) are placed into four compatibility categories (See the Compatibility Table in this section). In addition, the NRC program elements can also be identified as having particular health and safety significance or as being reserved solely to the NRC. Compatibility Category A program elements are basic radiation protection standards and scientific terms and definitions that are necessary to understand radiation protection concepts. An Agreement State should adopt Category A program elements in an essentially identical manner to provide uniformity in the regulation of agreement material on a nationwide basis. Compatibility Category B program elements apply to activities that have direct and significant effects in multiple jurisdictions. An Agreement State should adopt Category B program elements in an essentially identical manner. Compatibility Category C program elements do not meet the criteria of Category A or B but contain the essential objectives of which an Agreement State should adopt to avoid conflict, duplication, gaps, or other conditions that would jeopardize an orderly pattern in the regulation of agreement material on a nationwide basis. An Agreement State should adopt the essential objectives of the Category C program elements. Compatibility Category D program elements do not meet any of

the criteria of Category A, B, or C and, therefore, do not need to be adopted by Agreement States for purposes of compatibility.

Health and Safety (H&S) program elements are not required for compatibility but are identified as having a particular health and safety role (i.e., adequacy) in the regulation of agreement material within the State. Although not required for compatibility, the State should adopt program elements in this H&S category based on those of the NRC that embody the essential objectives of the NRC program elements because of particular health and safety considerations. Compatibility Category NRC program elements address areas of regulation that cannot be relinquished to Agreement States under the AEA, or the provisions of 10 CFR. These program elements are not adopted by Agreement States. The following table lists the parts and sections that will be revised and their corresponding categorization under the “Policy Statement on Adequacy and Compatibility of Agreement State Programs.” If the NRC promulgates the proposed rule’s amendments in a final rule, the Agreement States have 3 years from the final rule’s effective date, as noted in the *Federal Register*, to adopt compatible regulations.

Table 1. Compatibility Table for Proposed Rule

Section	Change	Subject	Compatibility	
			Existing	New
Part 2				
2.202(c)	Revised	Orders.	NRC	NRC
Part 30				
30.10(a) and (c)	Revised	Deliberate misconduct.	C	C
Part 40				
40.10(a) and (c)	Revised	Deliberate misconduct.	C	C
Part 50				
50.5(a) and (c)	Revised	Deliberate misconduct.	NRC	NRC
Part 52				
52.4(b) and (c)	Revised	Deliberate misconduct.	NRC	NRC
Part 60				
60.11(a) and (c)	Revised	Deliberate misconduct.	NRC	NRC

Part 61				
61.9b(a) and (c)	Revised	Deliberate misconduct.	C	C
Part 63				
63.11(a) and (c)	Revised	Deliberate misconduct.	NRC	NRC
Part 70				
70.10(a) and (c)	Revised	Deliberate misconduct.	C	C
Part 71				
71.8(b) and (d)	Revised	Deliberate misconduct.	C	C
Part 72				
72.12(a) and (c)	Revised	Deliberate misconduct.	NRC	NRC
Part 76				
76.10(a) and (c)	Revised	Deliberate misconduct.	NRC	NRC
Part 110				
110.7b(a) and (c)	Revised	Deliberate misconduct.	NRC	NRC
Part 150				
150.2	Revised	Deliberate misconduct.	D	D

XII. Backfitting and Issue Finality.

The proposed rule would revise the Deliberate Misconduct Rule as it appears in various sections of 10 CFR Chapter I. The proposed rule would revise the Deliberate Misconduct Rule by incorporating the concept of deliberate ignorance as an additional basis on which to take enforcement action against persons who violate the rule. The proposed rule would also revise the immediate effectiveness provisions at 10 CFR 2.202 to state that the respondent bears the burden of going forward with evidence to challenge immediate effectiveness and the NRC staff bears the burden of persuasion on whether adequate evidence supports immediate effectiveness. The proposed rule would also revise 10 CFR 2.202 to clarify that the presiding officer is permitted to order live testimony, either by its own motion, or upon the motion of any party to the proceeding.

The proposed revisions to the Deliberate Misconduct Rule would clarify the NRC's prohibition of deliberate misconduct to provide notice of proscribed conduct to all affected

persons. These revisions would not change, modify, or affect the design, procedures, or regulatory approvals protected under the various NRC backfitting and issue finality provisions.

Accordingly, the proposed revisions to the Deliberate Misconduct Rule, if promulgated as a final rule, would not represent backfitting imposed on any entity protected by the backfitting provisions in 10 CFR Parts 50, 70, 72, or 76, nor would the proposed revisions be inconsistent with any issue finality provision in 10 CFR Part 52.

The proposed revisions to 10 CFR 2.202 would clarify the agency's adjudicatory procedures with respect to challenges to immediate effectiveness of orders. These revisions would not change, modify, or affect the design, procedures, or regulatory approvals protected under the various NRC backfitting and issue finality provisions. Accordingly, the proposed revisions to the adjudicatory procedures, if adopted in final form, would not represent backfitting imposed on any entity protected by backfitting provisions in 10 CFR Parts 50, 70, 72, or 76, nor would the proposed revisions be inconsistent with any issue finality provision in 10 CFR Part 52.

List of Subjects

10 CFR Part 2

Administrative practice and procedure, Antitrust, Byproduct material, Classified information, Environmental protection, Nuclear materials, Nuclear power plants and reactors, Penalties, Sex discrimination, Source material, Special nuclear material, Waste treatment and disposal.

10 CFR Part 30

Byproduct material, Criminal penalties, Government contracts, Intergovernmental relations, Isotopes, Nuclear materials, Radiation protection, Reporting and recordkeeping requirements.

10 CFR Part 40

Criminal penalties, Government contracts, Hazardous materials transportation, Nuclear materials, Reporting and recordkeeping requirements, Source material, Uranium.

10 CFR Part 50

Antitrust, Classified information, Criminal penalties, Fire protection, Intergovernmental relations, Nuclear power plants and reactors, Radiation protection, Reactor siting criteria, Reporting and recordkeeping requirements.

10 CFR Part 52

Administrative practice and procedure, Antitrust, Backfitting, Combined license, Early site permit, Emergency planning, Fees, Inspection, Limited work authorization, Nuclear power plants and reactors, Probabilistic risk assessment, Prototype, Reactor siting criteria, Redress of site, Reporting and recordkeeping requirements, Standard design, Standard design certification.

10 CFR Part 60

Criminal penalties, High-level waste, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 61

Criminal penalties, Low-level waste, Nuclear materials, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 63

Criminal penalties, High-level waste, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Waste treatment and disposal.

10 CFR Part 70

Criminal penalties, Hazardous materials transportation, Material control and accounting, Nuclear materials, Packaging and containers, Radiation protection, Reporting and recordkeeping requirements, Scientific equipment, Security measures, Special nuclear material.

10 CFR Part 71

Criminal penalties, Hazardous materials transportation, Nuclear materials, Packaging and containers, Reporting and recordkeeping requirements.

10 CFR Part 72

Administrative practice and procedure, Criminal penalties, Manpower training programs, Nuclear materials, Occupational safety and health, Penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Spent fuel, Whistleblowing.

10 CFR Part 76

Certification, Criminal penalties, Radiation protection, Reporting and recordkeeping requirements, Security measures, Special nuclear material, Uranium enrichment by gaseous diffusion.

10 CFR Part 110

Administrative practice and procedure, Classified information, Criminal penalties, Export, Import, Intergovernmental relations, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements, Scientific equipment.

10 CFR Part 150

Criminal penalties, Hazardous materials transportation, Intergovernmental relations, Nuclear materials, Reporting and recordkeeping requirements, Security measures, Source material, Special nuclear material.

For the reasons set out in the preamble and under the authority of the Atomic Energy Act of 1954, as amended; the Energy Reorganization Act of 1974, as amended; and 5 U.S.C. 553; the NRC is proposing to amend 10 CFR parts 2, 30, 40, 50, 52, 60, 61, 63, 70, 71, 72, 76, 110, and 150 as follows:

PART 2 -- AGENCY RULES OF PRACTICE AND PROCEDURE

1. The authority citation for part 2 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 161, 181, 191 (42 U.S.C. 2201, 2231, 2241); Energy Reorganization Act sec. 201 (42 U.S.C. 5841); 5 U.S.C. 552; Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note).

Section 2.101 also issued under Atomic Energy Act secs. 53, 62, 63, 81, 103, 104 (42 U.S.C. 2073, 2092, 2093, 2111, 2133, 2134, 2135); Nuclear Waste Policy Act sec. 114(f) (42 U.S.C. 10143(f)); National Environmental Policy Act sec. 102 (42 U.S.C. 4332); Energy Reorganization Act sec. 301 (42 U.S.C. 5871).

Sections 2.102, 2.103, 2.104, 2.105, 2.321 also issued under Atomic Energy Act secs. 102, 103, 104, 105, 183i, 189 (42 U.S.C. 2132, 2133, 2134, 2135, 2233, 2239). Sections 2.200-2.206 also issued under Atomic Energy Act secs. 161, 186, 234 (42 U.S.C. 2201(b), (i), (o), 2236, 2282); sec. 206 (42 U.S.C. 5846). Section 2.205(j) also issued under Pub. L. 101-410, as amended by section 3100(s), Pub. L. 104-134 (28 U.S.C. 2461 note). Subpart C also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239). Section 2.301 also issued under 5 U.S.C. 554. Sections 2.343, 2.346, 2.712 also issued under 5 U.S.C. 557. Section 2.340 also issued under Nuclear Waste Policy Act secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161). Section 2.390 also issued under 5 U.S.C. 552. Sections 2.600-2.606 also issued under sec. 102 (42 U.S.C. 4332). Sections 2.800 and 2.808 also issued under 5 U.S.C. 553. Section 2.809 also issued under 5 U.S.C. 553; Atomic Energy Act sec. 29 (42 U.S.C. 2039). Subpart K also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239); Nuclear Waste Policy Act sec. 134 (42 U.S.C. 10154). Subpart L also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239). Subpart M also issued under Atomic Energy Act secs. 184, 189 (42 U.S.C. 2234, 2239). Subpart N also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239).

2. In § 2.202, revise paragraph (c)(2) to read as follows:

§ 2.202 Orders.

* * * * *

(c) * * *

(2)(i) The licensee or other person to whom the Commission has issued an immediately effective order in accordance with paragraph (a)(5) of this section may, in addition to demanding a hearing, at the time the answer is filed or sooner, file a motion with the presiding officer to set aside the immediate effectiveness of the order on the ground that the order, including the need

for immediate effectiveness, is not based on adequate evidence but on mere suspicion, unfounded allegations, or error. The motion must state with particularity the reasons why the order is not based on adequate evidence and must be accompanied by affidavits or other evidence relied on.

(ii) Any party may file a motion with the presiding officer requesting that the presiding officer order live testimony. Any motion for live testimony must be made in conjunction with the motion to set aside the immediate effectiveness of the order or any party's response thereto. The presiding officer may, on its own motion, order live testimony. The presiding officer's basis for approving any motion for, or ordering on its own motion, live testimony shall be that taking live testimony would assist in its decision on the motion to set aside the immediate effectiveness of the order.

(iii) In cases where the presiding officer orders live testimony, the NRC staff may present its response through live testimony or by a written response; if the NRC staff chooses to respond in writing, it shall respond within 5 days of the receipt of the presiding officer's order granting live testimony. Otherwise, the NRC staff shall respond in writing within 5 days of the receipt of a motion to set aside the immediate effectiveness of the order that does not include a motion to order live testimony or the presiding officer's order denying a motion for live testimony.

(iv) The presiding officer shall conduct any live testimony pursuant to § 2.319, except that no subpoenas, discovery, or referred rulings or certified questions to the Commission shall be permitted for this purpose.

(v) The presiding officer may, on motion by the staff or any other party to the proceeding, where good cause exists, delay the hearing on the immediately effective order at any time for such periods as are consistent with the due process rights of the licensee or other person and other affected parties.

(vi) The licensee or other person to whom the Commission has issued an immediately effective order bears the burden of going forward with evidence that the immediately effective

order is not based on adequate evidence, but on mere suspicion, unfounded allegations, or error. The NRC staff bears the burden of persuading the presiding officer that adequate evidence supports the grounds for the immediately effective order and immediate effectiveness is warranted.

(vii) The presiding officer must issue a decision on the motion to set aside the immediate effectiveness of the order expeditiously. During the pendency of the motion to set aside the immediate effectiveness of the order or at any other time, the presiding officer may not stay the immediate effectiveness of the order, either on its own motion, or upon motion of the licensee or other person.

(viii) The presiding officer will uphold the immediate effectiveness of the order upon finding adequate evidence to support immediate effectiveness. An order upholding immediate effectiveness will constitute the final agency action on immediate effectiveness. The presiding officer will promptly refer an order setting aside immediate effectiveness to the Commission and such order setting aside immediate effectiveness will not be effective pending further order of the Commission.

* * * * *

PART 30 -- RULES OF GENERAL APPLICABILITY TO DOMESTIC LICENSING OF BYPRODUCT MATERIAL

3. The authority citation for part 30 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 81, 82, 161, 181, 182, 183, 186, 223, 234 (42 U.S.C. 2111, 2112, 2201, 2231, 2232, 2233, 2236, 2273, 2282); Energy Reorganization Act secs. 201, 202, 206 (42 U.S.C. 5841, 5842, 5846); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 549 (2005).

Section 30.7 also issued under Energy Reorganization Act sec. 211, Pub. L. 95-601,

sec. 10, as amended by Pub. L. 102-486, sec. 2902 (42 U.S.C. 5851). Section 30.34(b) also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234). Section 30.61 also issued under Atomic Energy Act sec. 187 (42 U.S.C. 2237).

4. In § 30.10, revise paragraphs (a)(2) and (c) to read as follows:

§ 30.10 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, a certificate holder, an applicant, or a licensee's, certificate holder's or applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee, certificate holder or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, certificate holder, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 40 -- DOMESTIC LICENSING OF SOURCE MATERIAL

5. The authority citation for part 40 continues to read as follows:

AUTHORITY: Atomic Energy Act secs. 11(e)(2), 62, 63, 64, 65, 81, 161, 181, 182, 183, 186, 193, 223, 234, 274, 275 (42 U.S.C. 2014(e)(2), 2092, 2093, 2094, 2095, 2111, 2113, 2114, 2201, 2231, 2232, 2233, 2236, 2243, 2273, 2282, 2021, 2022); Energy Reorganization Act secs. 201, 202, 206 (42 U.S.C. 5841, 5842, 5846); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-59, 119 Stat. 594 (2005).

Section 40.7 also issued under Energy Reorganization Act sec. 211, Pub. L. 95-601, sec. 10, as amended by Pub. L. 102-486, sec. 2902 (42 U.S.C. 5851). Section 40.31(g) also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152). Section 40.46 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234). Section 40.71 also issued under Atomic Energy Act sec. 187 (42 U.S.C. 2237).

6. In § 40.10, revise paragraphs (a)(2) and (c) to read as follows:

§ 40.10 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or

applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 50 -- DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

7. The authority citation for part 50 continues to read as follows:

AUTHORITY: Atomic Energy Act secs. 102, 103, 104, 105, 147, 149, 161, 181, 182, 183, 186, 189, 223, 234 (42 U.S.C. 2132, 2133, 2134, 2135, 2167, 2169, 2201, 2231, 2232, 2233, 2236, 2239, 2273, 2282); Energy Reorganization Act secs. 201, 202, 206 (42 U.S.C. 5841, 5842, 5846); Nuclear Waste Policy Act sec. 306 (42 U.S.C. 10226); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 194 (2005). Section 50.7 also issued under Pub. L. 95-601, sec. 10, as amended by Pub. L. 102-486, sec. 2902 (42 U.S.C. 5851). Section 50.10 also issued under Atomic Energy Act secs. 101, 185 (42 U.S.C. 2131, 2235); National Environmental Policy Act sec. 102 (42 U.S.C. 4332). Sections 50.13, 50.54(dd), and 50.103 also issued under Atomic Energy Act sec. 108 (42 U.S.C. 2138).

Sections 50.23, 50.35, 50.55, and 50.56 also issued under Atomic Energy Act sec. 185 (42 U.S.C. 2235). Appendix Q also issued under National Environmental Policy Act sec. 102 (42 U.S.C. 4332). Sections 50.34 and 50.54 also issued under sec. 204 (42 U.S.C. 5844). Sections 50.58, 50.91, and 50.92 also issued under Pub. L. 97-415 (42 U.S.C. 2239). Section 50.78 also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152). Sections 50.80 - 50.81 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234).

8. In § 50.5, revise paragraphs (a)(2) and (c) to read as follows:

§ 50.5 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 52 -- LICENSES, CERTIFICATIONS, AND APPROVALS FOR NUCLEAR POWER PLANTS

9. The authority for part 52 continues to read as follows:

AUTHORITY: Atomic Energy Act secs. 103, 104, 147, 149, 161, 181, 182, 183, 185, 186, 189, 223, 234 (42 U.S.C. 2133, 2201, 2167, 2169, 2232, 2233, 2235, 2236, 2239, 2282); Energy Reorganization Act secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851);

Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

10. In § 52.4, revise paragraphs (b) and (c)(2) to read as follows:

§ 52.4 Deliberate misconduct.

* * * * *

(b) *Definitions.* For purposes of this section:

Deliberate misconduct by a person or entity means:

(i) An intentional act or omission that the person or entity knows would cause a licensee or an applicant for a license, standard design certification, or standard design approval to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license, standard design certification, or standard design approval issued by the Commission;

(ii) An intentional act or omission that the person or entity knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, holder of a standard design approval, applicant for a license, standard design certification, or standard design approval, or contractor or subcontractor; or

(iii) An intentional act or omission that the person or entity subjectively believes has a high probability of causing a violation described in paragraph (i) or (ii) of this definition, but the person or entity takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

(c) * * *

(2) Deliberately submit to the NRC; a licensee, an applicant for a license, standard design certification or standard design approval; or a licensee's, standard design approval holder's, or applicant's contractor or subcontractor, information:

(i) That the person or entity submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person or entity submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

PART 60 -- DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN GEOLOGIC REPOSITORIES

11. The authority citation for part 60 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 51, 53, 62, 63, 65, 81, 161, 182, 183, 223, 234 (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233, 2273, 2282); Energy Reorganization Act secs. 201, 202, 206, 211, Pub. L. 95-601, sec. 10, as amended by Pub. L. 102-486, sec. 2902 (42 U.S.C. 5841, 5842, 5846, 5851); sec. 14, Pub. L. 95-601 (42 U.S.C. 2021a); National Environmental Policy Act sec. 102 (42 U.S.C. 4332); Nuclear Waste Policy Act secs. 114, 117, 121(42 U.S.C. 10134, 10137, 10141); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

12. In § 60.11, revise paragraphs (a)(2) and (c) to read as follows:

§ 60.11 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 61 -- LICENSING REQUIREMENTS FOR LAND DISPOSAL OF RADIOACTIVE WASTE

13. The authority citation for part 61 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 53, 57, 62, 63, 65, 81, 161, 181, 182, 183, 223, 234 (42 U.S.C. 2073, 2077, 2092, 2093, 2095, 2111, 2201, 2231, 2232, 2233, 2273, 2282); Energy Reorganization Act secs. 201, 202, 206 (42 U.S.C. 5841, 5842, 5846), sec. 211, Pub. L. 95-601, sec. 10, as amended by Pub. L. 102-486, sec. 2902 (42 U.S.C. 5851). Pub. L. 95-601, secs. 10, 14, 92 Stat. 2951, 2953 (42 U.S.C. 2021a, 5851); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005 sec. 651(e), Pub. L. 109-58, 119 Stat. 806-810 (42 U.S.C. 2014, 2021, 2021b, 2111).

14. In § 61.9b, revise paragraphs (a)(2) and (c) to read as follows:

§ 61.9b Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

**PART 63 -- DISPOSAL OF HIGH-LEVEL RADIOACTIVE WASTES IN A GEOLOGIC
REPOSITORY AT YUCCA MOUNTAIN, NEVADA**

15. The authority citation for part 63 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 51, 53, 62, 63, 65, 81, 161, 182, 183 (42 U.S.C. 2071, 2073, 2092, 2093, 2095, 2111, 2201, 2232, 2233); Energy Reorganization Act secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); sec 14, Pub. L. 95-601 (42 U.S.C. 2021a); National Environmental Policy Act sec. 102 (42 U.S.C. 4332); Nuclear Waste Policy Act secs. 114, 117, 121 (42 U.S.C. 10134, 10137, 10141); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

16. In § 63.11, revise paragraphs (a)(2) and (c) to read as follows:

§ 63.11 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 70 -- DOMESTIC LICENSING OF SPECIAL NUCLEAR MATERIAL

17. The authority citation for part 70 continues to read as follows:

AUTHORITY: Atomic Energy Act secs. 51, 53, 161, 182, 183, 193, 223, 234 (42 U.S.C. 2071, 2073, 2201, 2232, 2233, 2243, 2273, 2282, 2297f); secs. 201, 202, 204, 206, 211 (42 U.S.C. 5841, 5842, 5845, 5846, 5851); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 194 (2005).

Sections 70.1(c) and 70.20a(b) also issued under secs. 135, 141, Pub. L. 97-425, 96 Stat. 2232, 2241 (42 U.S.C. 10155, 10161).

Section 70.21(g) also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152).

Section 70.31 also issued under Atomic Energy Act sec. 57(d) (42 U.S.C. 2077(d)).

Sections 70.36 and 70.44 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234).

Section 70.81 also issued under Atomic Energy Act secs. 186, 187 (42 U.S.C. 2236, 2237).

Section 70.82 also issued under Atomic Energy Act sec. 108 (42 U.S.C. 2138).

18. In § 70.10, revise paragraphs (a)(2) and (c) to read as follows:

§ 70.10 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a

requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 71 -- PACKAGING AND TRANSPORTATION OF RADIOACTIVE MATERIAL

19. The authority citation for part 71 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 53, 57, 62, 63, 81, 161, 182, 183, 223, 234, 1701 (42 U.S.C. 2073, 2077, 2092, 2093, 2111, 2201, 2232, 2233, 2273, 2282, 2297f); Energy Reorganization Act secs. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); Nuclear Waste Policy Act sec. 180 (42 U.S.C. 10175); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

Section 71.97 also issued under sec. 301, Pub. L. 96-295, 94 Stat. 789-790.

20. In § 71.8, revise paragraphs (b)(2) and (d) to read as follows:

§ 71.8 Deliberate misconduct.

* * * * *

(b) * * *

(2) Deliberately submit to the NRC, a licensee, a certificate holder, a quality assurance program approval holder, an applicant for a license, certificate or quality assurance program

approval, or a licensee's, applicant's, certificate holder's, or quality assurance program approval holder's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(d) For the purposes of paragraph (b)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee, certificate holder, quality assurance program approval holder, or applicant for a license, certificate, or quality assurance program approval to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license or certificate issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, certificate holder, quality assurance program approval holder, applicant, or the contractor or subcontractor of any of them; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (d)(1) or (d)(2) of this section but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 72 -- LICENSING REQUIREMENTS FOR THE INDEPENDENT STORAGE OF SPENT NUCLEAR FUEL, HIGH-LEVEL RADIOACTIVE WASTE, AND REACTOR-RELATED

GREATER THAN CLASS C WASTE

21. The authority citation for part 72 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 51, 53, 57, 62, 63, 65, 69, 81, 161, 182, 183, 184, 186, 187, 189, 223, 234, 274 (42 U.S.C. 2071, 2073, 2077, 2092, 2093, 2095, 2099, 2111, 2201, 2232, 2233, 2234, 2236, 2237, 2238, 2273, 2282, 2021); Energy Reorganization Act sec. 201, 202, 206, 211 (42 U.S.C. 5841, 5842, 5846, 5851); National Environmental Policy Act sec. 102 (42 U.S.C. 4332); Nuclear Waste Policy Act secs. 131, 132, 133, 135, 137, 141 148 (42 U.S.C. 10151, 10152, 10153, 10155, 10157, 10161, 10168); sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 549 (2005).

Section 72.44(g) also issued under secs. Nuclear Waste Policy Act 142(b) and 148(c), (d) (42 U.S.C. 10162(b), 10168(c), (d)).

Section 72.46 also issued under Atomic Energy Act sec. 189 (42 U.S.C. 2239); Nuclear Waste Policy Act sec. 134 (42 U.S.C. 10154).

Section 72.96(d) also issued under Nuclear Waste Policy Act sec. 145(g) (42 U.S.C. 10165(g)).

Subpart J also issued under Nuclear Waste Policy Act secs. 117(a), 141(h) (42 U.S.C. 10137(a), 10161(h)).

Subpart K is also issued under sec. 218(a) (42 U.S.C. 10198).

22. In § 72.12, revise paragraphs (a)(2) and (c) to read as follows:

§ 72.12 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, a certificate holder, an applicant for a license or certificate, or a licensee's, applicant's, or certificate holder's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee, certificate holder or applicant for a license or certificate to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license or certificate issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, certificate holder, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 76 -- CERTIFICATION OF GASEOUS DIFFUSION PLANTS

23. The authority citation for part 76 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 161, 223, 234, 1312, 1701 (42 U.S.C. 2201, 2273, 2282, 2297b-11, 2297f); Energy Reorganization Act secs. 201, 204, 206, 211 (42 U.S.C. 5841, 5842, 5845, 5846, 5851); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 549 (2005).

Section 76.22 also issued under Atomic Energy Act sec. 193(f) (42 U.S.C. 2243(f)).
Section 76.35(j) also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152).

24. In § 76.10, revise paragraphs (a)(2) and (c) to read as follows:

§ 76.10 Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, the Corporation, or its contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause the Corporation to

be in violation of any rule, regulation, or order, or any term, condition, or limitation of a certificate or approved compliance plan issued by the Director;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of the Corporation, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 110 -- EXPORT AND IMPORT OF NUCLEAR EQUIPMENT AND MATERIAL

25. The authority citation for part 110 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 51, 53, 54, 57, 63, 64, 65, 81, 82, 103, 104, 109, 111, 126, 127, 128, 129, 161, 181, 182, 183, 187, 189, 223, 234 (42 U.S.C. 2071, 2073, 2074, 2077, 2092–2095, 2111, 2112, 2133, 2134, 2139, 2139a, 2141, 2154–2158, 2201, 2231–2233, 2237, 2239, 2273, 2282); Energy Reorganization Act sec. 201 (42 U.S.C. 5841; Solar, Wind, Waste, and Geothermal Power Act of 1990 sec. 5 (42 U.S.C. 2243); Government Paperwork Elimination Act sec. 1704, 112 Stat. 2750 (44 U.S.C. 3504 note); Energy Policy Act of 2005, 119 Stat. 594.

Sections 110.1(b)(2) and 110.1(b)(3) also issued under 22 U.S.C. 2403. Section 110.11 also issued under Atomic Energy Act secs. 54(c), 57(d), 122 (42 U.S.C. 2074, 2152). Section 110.50(b)(3) also issued under Atomic Energy Act sec. 123 (42 U.S.C. 2153). Section 110.51 also issued under Atomic Energy Act sec. 184 (42 U.S.C. 2234). Section 110.52 also issued under Atomic Energy Act sec. 186 (42 U.S.C. 2236). Sections 110.80–110.113 also issued

under 5 U.S.C. 552, 554. Sections 110.130–110.135 also issued under 5 U.S.C. 553. Sections 110.2 and 110.42(a)(9) also issued under Intelligence Authorization Act sec. 903 (42 U.S.C. 2151 *et seq.*).

26. In § 110.7b, revise paragraphs (a)(2) and (c) to read as follows:

§ 110.7b Deliberate misconduct.

(a) * * *

(2) Deliberately submit to the NRC, a licensee, an applicant, or a licensee's or applicant's contractor or subcontractor, information:

(i) That the person submitting the information knows to be incomplete or inaccurate in some respect material to the NRC; or

(ii) When the person submitting the information subjectively believes that there is a high probability that the information submitted is incomplete or inaccurate in some respect material to the NRC but takes deliberate action to remain ignorant of the incompleteness or inaccuracy of that information.

* * * * *

(c) For the purposes of paragraph (a)(1) of this section, deliberate misconduct by a person means:

(1) An intentional act or omission that the person knows would cause a licensee or applicant to be in violation of any rule, regulation, or order; or any term, condition, or limitation of any license issued by the Commission;

(2) An intentional act or omission that the person knows constitutes a violation of a requirement, procedure, instruction, contract, purchase order, or policy of a licensee, applicant, contractor, or subcontractor; or

(3) An intentional act or omission that the person subjectively believes has a high probability of causing a violation described in paragraph (c)(1) or (c)(2) of this section, but the person takes deliberate action to remain ignorant of whether the act or omission causes or would have caused, if not detected, such a violation.

PART 150 -- EXEMPTIONS AND CONTINUED REGULATORY AUTHORITY IN AGREEMENT STATES AND IN OFFSHORE WATERS UNDER SECTION 274

27. The authority citation for part 150 is revised to read as follows:

AUTHORITY: Atomic Energy Act secs. 161, 181, 223, 234 (42 U.S.C. 2201, 2021, 2231, 2273, 2282); Energy Reorganization Act sec. 201 (42 U.S.C. 5841); Government Paperwork Elimination Act sec. 1704 (44 U.S.C. 3504 note); Energy Policy Act of 2005, Pub. L. 109-58, 119 Stat. 594 (2005).

Sections 150.3, 150.15, 150.15a, 150.31, 150.32 also issued under Atomic Energy Act secs. 11e(2), 81, 83, 84 (42 U.S.C. 2014e(2), 2111, 2113, 2114). Section 150.14 also issued under Atomic Energy Act sec. 53 (42 U.S.C. 2073).

Section 150.15 also issued under Nuclear Waste Policy Act sec. 135 (42 U.S.C. 10155). Section 150.17a also issued under Atomic Energy Act sec. 122 (42 U.S.C. 2152). Section 150.30 also issued under Atomic Energy Act sec. 234 (42 U.S.C. 2282).

28. In § 150.2, revise the last sentence to read as follows:

§ 150.2 Scope.

* * * This part also gives notice to all persons who knowingly provide to any

licensee, applicant for a license or certificate or quality assurance program approval, holder of a certificate or quality assurance program approval, contractor, or subcontractor, any components, equipment, materials, or other goods or services that relate to a licensee's, certificate holder's, quality assurance program approval holder's or applicant's activities subject to this part, that they may be individually subject to NRC enforcement action for violation of §§ 30.10, 40.10, 61.9b, 70.10, and 71.8.

Dated at Rockville, Maryland, this 30th day of January 2014.

For the Nuclear Regulatory Commission.

Annette L. Vietti-Cook,
Secretary of the Commission.

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